# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Argument | 8 |
| Conclusion | 22 |


## CITATIONS

Cases:


*Bakers' Mutual Coop. Assn.* v. *Commissioner* 117 F. 2d 27 — 21

*Burr Oaks Corp.* v. *Commissioner*, 365 F. 2d 24 — 15

*Commissioner* v. *Brown*, 380 U.S. 563 — 8, 9, 17, 18, 19

*Commissioner* v. *Kenisco Cemetery*, 96 F. 2d 594, affirming 35 B.T.A. 498, nonacquiesced in, 1937–1 Cum. Bull. 40 — 14, 15, 16, 20, 21

*Commissioner* v. *Sunnen*, 333 U.S. 591 — 21

*Forest Lawn Memorial Park Association, Inc.* v. *Commissioner*, 45 B.T.A. 1091, nonacquiesced in, 1942–2 Cum. Bull. 25, nonacquiescence withdrawn and acquiesced in, 1946–2 Cum. Bull. 2, acquiescence withdrawn and nonacquiesced in, 1960–2 Cum. Bull. 8 — 14, 15, 16, 20, 21

*Gardens of Faith, Inc.* v. *Commissioner*, 345 F. 2d 180, affirming *per curiam* 23 T.C.M. 1045, certiorari denied, 382 U.S. 927 — 12

*Green Bay & W. R. Co.* v. *Commissioner*, 147 F. 2d 585 — 21

*John Kelley Co.* v. *Commissioner*, 326 U.S. 521 — 21




708-525—73——1

Cases—Continued


| | Page |
|---|---|
| *Knollwood Memorial Gardens* v. *Commissioner*, 46 T.C. 764 | 13, 14, 15, 16 |
| *Mabee Petroleum Corp.* v. *United States*, 203 F. 2d 872 | 15 |
| *Peterson* v. *Commissioner*, 380 F. 2d 1 | 11 |
| *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339 | 20 |
| *Schnitzer* v. *Commissioner*, 13 T.C. 43, affirmed *per curiam*, 183 F. 2d 70 | 21 |
| *Sherwood Memorial Gardens* v. *Commissioner*, 350 F. 2d 225 | 10, 14 |
| *Texas Trade School* v. *Commissioner*, 30 T.C. 642 affirmed *per curiam*, 272 F. 2d 168 | 15 |
| *United States* v. *Byrum*, 408 U.S. 125 | 8, 20 |
| *University Hill Foundation* v. *Commissioner*, 446 F. 2d 701, certiorari denied, 405 U.S. 965 | 18 |
| *Wetterau Grocer Co.* v. *Commissioner*, 179 F. 2d 158 | 21 |


Statutes:


| | |
|---|---|
| Internal Revenue Code of 1939: | |
| 26 U.S.C. 101(5) | 6 |
| Internal Revenue Code of 1954: | |
| 26 U.S.C. 501(c) | 2, 6, 9, 13 |
| 26 U.S.C. 1201 | 17 |
| 26 U.S.C. 1222(3) | 17, 18 |

# In the Supreme Court of the United States

OCTOBER TERM, 1973

---

No. 72-1518

ROSE HILLS MEMORIAL PARK ASSOCIATION, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the trial commissioner of the Court of Claims (Pet. App. 1a–76a) is unreported. The opinion of the Court of Claims (Pet. App. 1b–66b) is reported at 463 F. 2d 425.

### JURISDICTION

The opinion of the Court of Claims was filed on July 14, 1972. (Pet. App. 1b.) A petition for rehearing was denied on December 12, 1972. (Pet. App. 1c.) The time for filing a petition for a writ of certiorari was extended by Mr. Chief Justice Burger on February 21, 1973, to and including May 11, 1973. The

petition for a writ of certiorari was filed on May 10, 1973, and served on May 11, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

## QUESTION PRESENTED

Whether the Court of Claims correctly upheld the revocation of petitioner's tax-exempt status as a nonprofit cemetery company on the ground that part of taxpayer's net earnings inured to private shareholders or individuals in contravention of Section 501(c)(13) of the Internal Revenue Code of 1954.

## STATUTE INVOLVED

Section 501(c)(13) of the Internal Revenue Code of 1954 is set forth in the petition (pp. 3–4).

## STATEMENT

Petitioner was organized in October, 1950, to operate as a nonprofit cemetery corporation near Los Angeles, California, and has since become the nation's largest single-tract cemetery, in terms of both acreage and total sales. Petitioner is the successor to a series of for-profit cemetery corporations, which, until 1951, owned less than 200 acres of cemetery land. The last of these for-profit corporations, Bartolo Corporation, entered into a letter agreement with petitioner, dated November 1, 1950, by which it was agreed that petitioner would take over the operation of the cemetery and conduct the business in a manner similar to that which Bartolo had employed. At the time petitioner was formed, all seven of its trustees were shareholders of Bartolo or members of a Los Angeles law firm

which represented the shareholders. Although some outside trustees were subsequently appointed, at all times relevant to this suit the Bartolo shareholders and members of the Los Angeles law firm constituted a majority of petitioner's trustees. (Pet. App. 2b, 4b, 17b, 62b, 28a)

During the years 1951 and 1952, Bartolo continued to acquire tracts of new land for use in the cemetery business, and on two occasions it sold small parcels to petitioner. On December 26, 1952, petitioner and the stockholders of Bartolo Corporation entered into a stock purchase agreement which forms the basis of the instant litigation. Under the agreement, all of Bartolo's stock was sold to petitioner, in exchange for which the Bartolo shareholders were to receive a stated percentage of petitioner's gross receipts from the sale of gravesites on land acquired from Bartolo, with no fixed total sales price, no minimum annual payment, and no provision for interest. Payments were to be calculated on the following basis: 30% of the gross selling price of gravesites sold from any property acquired from Bartolo; 10% of sales of mausoleums, niches, and crypts; 20% and 25% of sales of various underground crypts; 50% of rents and royalties received for the use of any of petitioner's real property; and on sales of real property under any other circumstances, during the first five years, 90% of the proceeds, during the following 10 years, 80%, and, thereafter, 75%. The agreement was to remain in force until all of the property was sold and fully paid for. (Pet. App. 3b–4b.)

The December 26, 1952, agreement further provided that upon consent of 51% in interest of the selling stockholders, they could subordinate their claims to debts which petitioner might incur to third parties and that they might postpone or defer, in whole or in part, payment of any amounts due from petitioner. With respect to any possible default, the parties recognized that the price to be paid was "in an amount not presently determinable and over a period, the duration of which cannot presently be determined." In lieu of actual damages in the event of petitioner's default, therefore, 51% of the sellers could immediately demand payment of any amounts then due and recover the Bartolo stock or the unsold land. At the time of the stock purchase, Bartolo had acquired some 2,154 acres of land, which could accommodate approximately 2,445,000 gravesites. At the 1952 selling rate of 12,500 spaces per year, it was anticipated that the agreement would continue for about 200 years. If the then-prevailing selling price of $160 per lot remained constant, the sellers expected to receive some $615,000 per year, or a total of $123,000,000. (Pet. App. 4b–6b.)

From 1952 through 1966 Bartolo and petitioner embarked on a major development of the cemetery, including the improvement of existing buildings, the construction of new buildings, and the clearing and grading of some 633 acres of new land for gravesites. In total, the cost of these projects was some $7,669,000, for which Bartolo and petitioner were forced to borrow $1,500,000 from two banks. In order to obtain these loans,

the former Bartolo shareholders agreed to subordinate their rights under the 1952 agreement to those of the two banks, up to a total of $2,500,000 of indebtedness. In addition, the former Bartolo shareholders agreed that during the existence of the bank debt, petitioner would limit its payments to them to $120,000 per year and would defer the remainder without interest. (Pet. App. 5b.)

By 1957, petitioner's line of credit with the banks was outpaced by the cash needs imposed by its development program. Thus, in 1961 the Bartolo shareholders agreed to an amendment of the 1952 agreement which reduced the percentages of gross sales payable to them by approximately one-third, retroactive to 1958 and to continue until 1978. Thereafter, the original terms of the agreement were to be substantially reinstated. In exchange for this amendment, petitioner extended its percentage-of-sales obligation to all lands acquired by it at any time after the 1952 agreement. For the period 1958 through 1967, the effect of the reduced percentages was to lower the accrued amount payable to the former Bartolo shareholders by $2,577,000. (Pet. App. 5b–6b.)

From the inception of the 1952 agreement until September 30, 1968, the former Bartolo shareholders had received $5,500,000 from petitioner, with an additional $1,884,784 due and deferred under the subordination agreements. Petitioner's position by 1968 had also improved. By that time it had accumulated over $7,000,000 in cash and had achieved a net worth of $10,000,000. (Pet. App. 6b.)

On August 27, 1952, petitioner was granted an exemption from income tax under Section 101(5) of the Internal Revenue Code of 1939 (the predecessor of Section 501(c)(13) of the 1954 Code), which, as pertinent here, exempts from tax any cemetery corporation if no part of its net earnings "inures to the benefit of any private shareholder or individual." On March 10, 1966, after notification of its proposed action and after protest by petitioner, the Internal Revenue Service revoked petitioner's exemption retroactive to all years beginning after September 30, 1961. The basis for this revocation was the determination that under the 1952 agreement between petitioner and the shareholders of Bartolo Corporation, the stockholders had exchanged their equity interest in Bartolo for a continuing equity interest in petitioner, represented by their contractual right to receive a percentage of petitioner's income on all sales—for an indefinite and extended period of time—on the land acquired from Bartolo. This equity interest, akin to a common stock interest in petitioner's earnings, thus allowed a portion of the cemetery's net earnings to "inure" to the benefit of private individuals in contravention of Section 501(c)(13) of the 1954 Code. (Pet. App. 2b, 6b–7b, 30b.)

After filing an income tax return and making payment of taxes, petitioner instituted the present suit in the Court of Claims for refund of $245,219, plus interest, for its fiscal year 1965, claiming that it had improperly been denied its tax-exempt status. The Court of Claims trial commissioner held that under

the contracting parties' expectation that the 1952 agreement would pay the former Bartolo stockholders a total of $123,000,000 in 200 years, a bona fide sale had occurred with a purchase price of $6,951,583, payable in installments over 200 years, with interest at 7%. Having found a valid sale by the Bartolo shareholders, the trial commissioner concluded that the shareholders had no equity interest in petitioner which could cause a portion of its net earnings to inure to their benefit. (Pet. App. 5a, 7a, 22a, 76a).

The Court of Claims reversed the trial commissioner. The court held that no bona fide sale had occurred and that Bartolo stockholders under the 1952 agreement held no valid debt obligation, but rather retained an equity interest in petitioner. In so holding, the court emphasized eight factors. (1) There was no unqualified obligation to pay, since installments depended upon the sale of gravesites. (2) There was no maturity date on the alleged debt, since payments were to continue until all lots were sold. (3) No sum certain was specified, and in fact the total amount payable remains subject to considerable fluctuation due to increases of as much as 125% in the price of gravesites. (4) There was no stated interest rate. (5) There was no provision for minimum annual payments. (6) There was no right to share with general creditors in the assets of petitioner upon dissolution. (7) Petitioner lacked paid-in capitalization, but rather was formed specifically to be the recipient of the land acquired by Bartolo. (8) The alleged sellers had complete control over petitioner, since they constituted its

508-525—73——2

board of trustees. The court supported its decision with citations, *inter alia,* to decisions of five circuit courts of appeals and the Tax Court, all holding that various forms of "indebtedness" payable out of a share of a cemetery's sales proceeds and issued to acquire land were in reality equity investments. These and other recent decisions, the court held, had "considerably weakened" the two 30-year-old cases upon which petitioner placed considerable reliance. Finally, the court distinguished this Court's decision in *Commissioner* v. *Brown,* 380 U.S. 563, on the grounds that there the buyer and seller of a going business bargained at arm's-length and in good faith to reach a reasonable, fixed price payable over a definite, ten-year period. (Pet. App. 7b, 11b–13b, 15b)

After entry of judgment dismissing the cemetery's petition, petitioner filed a petition for rehearing, arguing principally that this Court's recent decision in *United States* v. *Byrum,* 408 U.S. 125, mandated a decision in its favor. That petition was denied. (Pet. App. 1c.)

## ARGUMENT

The decision below is correct and conforms to the principles enunciated by this Court in *Commissioner* v. *Brown,* 380 U.S. 563, and *United States* v. *Byrum,* 408 U.S. 125. Rather than create a conflict, as petitioner suggests, the present decision explicitly follows recent decisions of several courts of appeals and the Tax Court, which, in turn, have dismissed as outdated and factually inapposite the single court of appeals decision upon which petitioner relies in asserting a

conflict. Further review by this Court at this time is not warranted.

1. In its application for a writ of certiorari, petitioner seeks, alternatively, both to limit and to expand the scope of judicial precedent which should be deemed relevant to the decision below. On the one hand, petitioner attempts to distinguish (Pet. 31–32) the recent court of appeals and Tax Court decisions which have addressed themselves to the debt-equity issue inherent in percentage-of-sales arrangements for the acquisition of real estate by for-profit and nonprofit cemeteries. All these cases are dismissed as not involving the precise question of a cemetery's exemption from tax under Section 501(c)(13) of the Internal Revenue Code of 1954, which, as relevant here, permits exemption only if "no part of the net earnings of [the cemetery] * * * inures to the benefit of any private shareholder or individual." On the other hand, petitioner claims (Pet. 24–32) that the decision below, in its analysis of the 1952 agreement by which petitioner acquired the majority of its land, conflicts with the principles established by this Court in *Commissioner* v. *Brown,* 380 U.S. 563—a case which obviously does not touch upon the exemption of cemeteries from tax. Petitioner cannot have it both ways. The fact is that the recent cemetery cases do control the result in the present litigation—not because they deal specifically with cemeteries, but because they explicate legal principles of general application (some of which were involved in *Brown*) in factual contexts almost precisely identical to that in-

volved here. These cases were quite properly relied upon by the Court of Claims.

In *Sherwood Memorial Gardens* v. *Commissioner*, 350 F. 2d 225 (C.A. 7), a newly organized for-profit cemetery issued 1,000 "certificates of indebtedness" to two nonshareholders in exchange for their transfer of land and $30,000 in cash to develop the land for cemetery purposes. The certificate holders were entitled to receive 25% of the base sales price of burial spaces sold by the cemetery for a period of 15 years from the date of the first sale. The cemetery corporation deducted amounts paid to the certificate holders as a cost of the land sold, and these deductions were disallowed on the ground that they constituted distributions with respect to equity capital. Consequently, the issue to be decided was framed in terms of whether the certificates represented a bona fide indebtedness of the corporation or a proprietary equity interest of the certificate holders. In holding that no valid indebtedness had been created, the court of appeals noted the taxpayer's argument that the certificate holders had no interest in the cemetery's net income *per se*, that their interest would expire in 15 years, that they had no voting or management rights in the cemetery, and that in case of insolvency the certificate holders would be classified as creditors. The court nonetheless found these factors unpersuasive in the face of the absence of the classic criteria of a bona fide debt: The cemetery was not obligated to pay a sum certain at a reasonably close maturity date, no provision was made for the payment of interest,

the corporation was thinly capitalized and could guarantee no return except on the anticipated sale of lots, and the form of the transaction remained difficult to explain save for an obvious attempt to avoid income taxes.

*Peterson* v. *Commissioner*, 380 F. 2d 1 (C.A. 9), considered the same type of transaction from the point of view of the certificate holders, who had reported the receipt of periodic payments as capital gain rather than as ordinary income. In exchange for the transfer of land to the cemetery, the certificate holders were entitled to 20%, in perpetuity, of the gross sales price of each burial lot and 10% of the price of memorials and markers sold at the cemetery. The Ninth Circuit upheld the Tax Court's characterization of the distributions to the certificate holders as dividends, on the grounds that the purported "creditors" had a right to receive payments only if the corporation consummated sales, that there was no provision for the payment of interest, that the amount of the "debt" was not fixed, and that there was no fixed maturity date. Summarizing its holding, the court noted (380 F. 2d, p. 2, fn. 2):

> Schemes by which cemetery operators buy a plot of land and then trade it to a closely held corporation for certificates of indebtedness have been before the courts a number of times in recent years. All the schemes have been substantially identical to the Petersons'. The basic idea is to get the human bodies in the ground and the money out, at capital gains rates, as fast as possible. Courts have had little difficulty

labeling these transactions as disguised equity investments and in applying dividend treatment.

In *Gardens of Faith, Inc.* v. *Commissioner*, 345 F. 2d 180 (C.A. 4), affirming *per curiam* 23 T.C.M. 1045, certiorari denied, 382 U.S. 927, the tax treatment of both the certificate holders and the cemetery corporation were at issue with respect to distributions made in accordance with certificates of indebtedness. The arrangement there was for the payment of 25% of gross sales to the certificate holders for a period of 50 years. In an exhaustive opinion explicitly approved by the Fourth Circuit as expressing correct legal principles,[1] the Tax Court held the payments to be nondeductible distributions with respect to equity (as to the corporation) and ordinary dividend receipts (as to the certificate holders). The court found none of the criteria normally associated with bona fide indebtedness. No sum certain was due, with interest, at a fixed maturity date. The purchasers of the certificates placed their funds completely at the risk of the enterprise, relying entirely on the success of the cemetery's sales program for repayment, with no remedy against the thinly capitalized corporation. To the ex-

[1] Petitioner erroneously asserts that the court of appeals did not "purport to examine any issues of law." (Pet. 31.) In fact, the Fourth Circuit's opinion states (345 F. 2d, p. 181):

"The opposing arguments addressed to us by the taxpayers in their brief and oral presentation are fairly stated and convincingly answered in the exhaustive opinion of the Tax Court. This case presents a mixed question of law and fact. The correct legal principle was followed and the resolution of the factual issue by the Tax Court was warranted."

tent they reserved to themselves the right, upon the failure of the corporation to realize a minimum volume of sales, to take over management of the cemetery, they were possessed of a remedy usually associated with preferred shareholders rather than creditors. Finally, the court noted the absence of any valid business reason for structuring the certificate holders' contribution to the corporation in terms of purported debt—other than an attempt to avoid both shareholder and corporate-level taxation.

*Knollwood Memorial Gardens* v. *Commissioner*, 46 T.C. 764, is the only recent case to apply the classic debt-equity distinction expressed in the above-cited decisions not only to a cemetery's deductions of payments to the holders of its certificates of indebtedness under a percentage-of-sales agreement, but also to the question of the cemetery's tax-exempt status under Section 501(c)(13). In a factual setting almost identical to that involved in the present case, a nonprofit cemetery acquired land and the seller's obligation to develop it in exchange for 20% of the sales price of gravesites for a period of 20 years after the last grave was sold. The court reviewed the familiar criteria indicating the lack of bona fide indebtedness to the landshare holders, including the lack of an unconditional promise to pay, the lack of a fixed maturity date, and the absence of any provision for interest. The court also found present all of the typical indicia of an equity interest on the part of the landshare holders—the absence of any capital or assets in the cemetery before its acquisition of land from the land-

share holders, the complete dependency for payment upon sales by the cemetery, and the continuing control over the operation of the cemetery by the landshare holders as managers and trustees of the cemetery. Under these circumstances, the court held, the cemetery was operated, at least in part, for the benefit of the landshare holders, who received a portion of the cemetery's profits on each sale of a gravesite.

The court then dealt at great length with the precise issue raised by petitioner here, *i.e.*, the precedential effect of the 30-year-old decisions in *Commissioner* v. *Kensico Cemetery*, 96 F. 2d 594 (C.A. 2), affirming 35 B.T.A. 498, nonacquiesced in, 1937–1 Cum. Bull. 40, and *Forest Lawn Memorial Park Association, Inc.* v. *Commissioner*, 45 B.T.A. 1091, nonacquiesced in, 1942–2 Cum. Bull. 25, nonacquiescence withdrawn and acquiesced in 1946–2 Cum. Bull. 2, acquiescence withdrawn and nonacquiesced in, 1960–2 Cum. Bull. 8. The court had earlier distinguished these cases in *Sherwood Memorial Gardens, supra*, on the ground that they involved nonprofit, nonstock cemeteries. The court found that distinction to lack continuing viability (46 T.C., p. 786):

> * * * we do not see any meaningful or convincing difference between equity interests owned by nonstockholders in a thinly capitalized stock corporation and similar interests owned by individuals who contribute to nonstock corporations in return for such interests.
>
> Section 501(c)(13) of the Code, denies tax-exempt status if part of the net earnings of a cemetery corporation, otherwise exempt thereunder, inures to the benefit of any *"individual"*

> whether or not a shareholder in the corporation. The statute thus specifically recognizes that corporate profits may wind up in the hands of nonstockholders, and whenever this happens, unless the corporation qualifies otherwise under the section, exemption is denied. We think the exemption should be denied in the case of nonstock membership corporations as well as in the case of stock corporations wherever the facts disclose that individuals share in the corporate profits because of equity interests. The net earnings of Knollwood's operation cannot be properly computed by first deducting payments to the landshare holders because those payments were not payments for the purchase price of land. Thus the distributions by whatever name called are of net earnings.

Citing cases such as *Mabee Petroleum Corp.* v. *United States*, 203 F. 2d 872 (C.A. 5) (denying tax exemption because excessive salary payments had been made to an officer of a nonprofit corporation), *Texas Trade School* v. *Commissioner*, 30 T.C. 642, affirmed *per curiam*, 272 F. 2d 168 (C.A. 5) (denying tax exemption because net earnings of an exempt corporation had inured to individuals under a lease agreement specifying unreasonable rentals), and *Burr Oaks Corp.* v. *Commissioner*, 365 F. 2d 24 (C.A. 7) (holding notes taken on the transfer of land to be an equity interest rather than a debt of the corporate obligor), the court noted (46 T.C. 790) that "the state of judicial mind * * * has undergone a noticeable change" since *Kensico* and *Forest Lawn*. Unlike the simplistic approach taken in those cases—in which

no more than the form of the purported debt instruments was examined—courts now inquire into the underlying provisions of an alleged indebtedness to determine whether an equity interest has been conveyed. The court held that such a disguised equity interest was held by nonshareholders in the Knollwood Cemetery.

The court below cited and followed the decisions outlined above. In so doing, the court noted that each case turned on the distinction between a bona fide indebtedness and an equity interest cast in the form of debt. As in *Knollwood Memorial Gardens, supra,* the court held that the existence of an equity interest in petitioner by definition permitted its net earnings to inure to Bartolo's former shareholders. While this decision is at odds with the earlier decisions of the Second Circuit and the Board of Tax Appeals in *Commissioner* v. *Kensico, supra,* and *Forest Lawn Memorial Park Association, Inc.* v. *Commissioner, supra,* no current conflict of decisions is thereby created. As the cited cases have held, those older decisions were based merely on a superficial examination of the form of the ostensible debt instruments issued by the cemeteries. By applying the substantive inquiry of more recent cases into the nature of the purported debt, the lower court avoided a serious present-day conflict which would have cast doubt upon a great body of decisional law which questions the substance underlying the form of debt instruments.[2] Thus, rather than

[2] Cases dealing with the debt-equity question in recent years have been multitudinous. Many of these decisions were cited and followed in the cemetery cases outlined above.

creating the conflict petitioner asserts, the present decision in fact contributes to a harmony of decisions involving percentage-of-sales arrangements with respect to both cemeteries and other entities which seek to acquire property without incurring a fixed obligation to pay for it.

2. Petitioner argues (Pet. 24–32) that the present decision is at odds with this Court's decision in *Commissioner* v. *Brown*, 380 U.S. 563. There the stock of a going lumber business was transferred to a tax-exempt organization in exchange for a note, specifying a fixed price to be paid out of a percentage of operating profits for a period of ten years. The Commissioner argued that no valid "sale" had taken place since all risks of the business remained with the sellers, and therefore the sellers were not entitled to report their receipts as long-term capital gain under Sections 1201 and 1222(3) of the Code. The Court found that the sales price had been reached after arm's-length bargaining between the parties and that, considering the company's earnings and assets, it fell within a reasonable range. Refusing to adopt the Commissioner's gloss on the term "sale" as it appears in the capital gains provisions—a gloss which would have required a substantial degree of shifting of the risks of the business from seller to buyer in order for the transaction to qualify for capital gains treatment—the Court held that under the facts an effective sale had been consummated.

The situation in the present case is entirely different from that in *Brown*. No fixed sales price was ever

established. The Bartolo shareholders will never know the total payout involved here until every gravesite is sold—over a period of time which petitioner's witnesses estimate to be no less than 200 years. No arm's-length bargaining preceded the formalization of the 1952 agreement between petitioner and the Bartolo shareholders. Indeed, the shareholders did no more than bargain with themselves in their dual role as sellers and trustees for the buyer. Finally, the reluctance of this Court in *Brown* to redefine the word "sale" as it appears in Section 1222(3) to connote less than it does in its everyday usage reflects little on the question whether the Bartolo shareholders here are possessed of an interest resembling an equity interest which permits petitioner's net earnings to inure to their benefit.[3]

Petitioner creates an argument of surface appeal by assuming that the Bartolo stock was sold to petitioner for a definite price, payable in installments over a period of years. Apparently in reliance on the trial commissioner's opinion, the argument runs that given the gravesites available for sale, the rate of sale and the price per lot at the time of the 1952 agreement, the shareholders could have expected to receive a total of $123,000,000 over 200 years. Discounted to present value of some $7,000,000, this amount was well within

[3] In 1971, the revocation of the tax-exempt status of an exempt organization which engaged in transactions virtually identical to that involved in *Brown* was upheld. *University Hill Foundation* v. *Commissioner*, 446 F. 2d 701 (C.A. 9). This Court denied the organization's petition for certiorari, 405 U.S. 965.

a reasonable price of the land, set at $10,000,000.[4] This, however, was simply not the arrangement agreed upon by the parties. Far from setting aside for the sellers a definite dollar amount on the sale of each gravesite, the parties specified that a percentage of the sales price would flow to the Bartolo shareholders. Thus, the amount of their anticipated return was dependent not only on the success of petitioner's sales program in terms of the rapidity of payout, but, in addition, the sales price of the lots themselves governed the total amount to be received. As the lower court noted (Pet. App. 12b), the price of gravesites was subject to great fluctuation, selling in 1968 at 52% over their 1952 price and 125% over their 1947 price. Thus, while in *Brown* a sale was consummated for a fixed price—albeit that the risks of the business were retained for a period of time by the sellers—here the Bartolo shareholders have merely exchanged their equity interest in the net profits of a for-profit cemetery for a percentage share, to continue indefinitely, of the gross profits of a nonprofit cemetery which they organized to take over their business. There has been no relinquishment of their equity interest in this wasting asset, and the shareholders will continue to enjoy the fruits of this enterprise until they are exhausted. Unlike the exempt organization in *Brown*, there is no possibility that the petitioner here can ever succeed to the interest held by the shareholders.

[4] Certain of the trial commissioner's findings are set forth, with appropriate argument, at pages 11–12 of the petition.

3. Petitioner makes a final argument (Pet. 32–40) based on this Court's recent decision in *United States* v. *Byrum*, 408 U.S. 125. It argues that in structuring its 1952 agreement with the Bartolo shareholders, it had a right to rely upon the decisions of the Second Circuit and the Board of Tax Appeals in *Commissioner* v. *Kensico Cemetery, supra,* and *Forest Lawn Memorial Park Association* v. *Commissioner, supra.* In *Byrum,* petitioner points out, this Court stressed the importance of adherence to established judicial precedent in construing the Internal Revenue Code.[5] In *Byrum,* however, the Court found that decedent had justifiably relied on its earlier holding in *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, in which rights similar to those retained by decedent in an *inter vivos* trust had been held insufficient to bring the earlier trust within the earlier decedent's gross estate. Here, on the other hand, any reliance petitioner may have placed on *Kensico* and *Forest Lawn* must surely be viewed as less substantial than reliance upon a decision of this Court. Neither of those cases, moreover, involved so obvious a retention of an equity interest as is present in the instant case. In *Kensico,* the cemetery was a cooperative membership corporation in which the members were the owners of burial sites and not the former shareholders of a profit-making organization. In neither of the former cases was there an absence of arm's-

[5] To the extent that petitioner may have relied upon the Commissioner's acquiescence, between 1946 and 1960, in *Forest Lawn,* this reliance must also have been tempered by the Commissioner's continued nonacquiescence in *Kensico,* 1937–1 Cum. Bull. 40.

length dealing between the parties to the transaction by which cemetery property was acquired, nor was there evidence that the property had been acquired by the sellers shortly before the transfer. Finally, neither case involved a subordination of rights by the security holders to the claims of other creditors.

Most important, however, petitioner offers no justification, in its alleged reliance on *Kensico* and *Forest Lawn*, for its failure to consider the very substantial body of pre-1952 case law which clearly undercut the reasoning of those cases.[6] In this context, the words of this Court in *Commissioner* v. *Sunnen*, 333 U.S. 591, 599, with respect to a taxpayer's reliance on a prior judicial determination of his *own* tax liability are particularly appropriate:

> A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other tax-

[6] See, e.g., *John Kelley Co.* v. *Commissioner*, 326 U.S. 521; *Bakers' Mutual Coop. Assn.* v. *Commissioner*, 117 F.2d 27 (C.A. 3); *Green Bay & W. R. Co.* v. *Commissioner*, 147 F. 2d 585 (C.A. 7); *Schnitzer* v. *Commissioner*, 13 T.C. 43, affirmed *per curiam*, 183 F. 2d 70 (C.A. 9); *Wetterau Grocer Co.* v. *Commissioner*, 179 F. 2d 158 (C.A. 8).

> payers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. * * * Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT H. BORK,
*Solicitor General.*
SCOTT P. CRAMPTON,
*Assistant Attorney General.*
ERNEST J. BROWN,
PAUL M. GINSBURG,
*Attorneys.*

JULY 1973.

U.S. GOVERNMENT PRINTING OFFICE 1973